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# Steven C. Davis and Kristi A. Davis v. U.S. Bancorp Mortgage Company, formerly U.S. Bancorp Real Estate Services, formerly U.S. Thrift and Loan; and H. Clyde Davis : Reply Brief

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS



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| STEVEN C. DAVIS and KRISTI A. DAVIS,<br><br>Plaintiffs, Appellees, and Cross-Appellees<br><br>vs.<br><br>U.S. BANCORP MORTGAGE COMPANY, formerly U.S. BANCORP REAL ESTATE SERVICES, formerly U.S. THRIFT & LOAN; and H. CLYDE DAVIS,<br><br>Defendants, Appellees, and Cross-Appellant | Case No. 940443-CA<br><br>Priority No. 2 |

APPELLANTS' REPLY BRIEF

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH

COUNTY, STATE OF UTAH

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## ARGUMENT

### POINT I: THE PLAINTIFFS HAVE PROPERLY PRESENTED THE EVIDENCE IN OPPOSITION TO SUMMARY JUDGMENT.

Appellees contend in Point I of their brief that the Plaintiffs failed to submit the evidence relied upon to refute the motion for summary judgment at the trial court level (Appellee's brief at 15-18).

As demonstrated hereinafter, all of the facts relied upon by the Plaintiffs were a part of the Record at the time the trial court rendered its decision in this case. All of the facts, as set out in the Statement of Facts in Appellants' brief are referenced to specific entries in the Record in this case.

Although an Appellant is precluded from raising new evidence on appeal, the Appellant is certainly free to argue all of the evidence in the Record at the time the motion for summary judgment was decided by the trial court judge. As noted by the Court in Dikeou v. Osborn, 881 P.2d 943 n. 4 (Utah Ct. App.

1994), the appellate court has an obligation and responsibility to "review a trial court's grant of summary judgment using only the information on file at the time the trial court granted the motion."

The Court in Ron Shepherd Insurance v. Shields, 882 P.2d 650 (Utah 1994), clearly identified the process in reviewing a motion for summary judgment as follows:

> Summary judgment allows the parties to pierce the pleadings to determine whether a material issue of facts exists that must be resolved by the fact finder [citing cases]. In accordance with this rule, "the party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact. **A party opposing a motion is required only to show that there is a material issue of fact.** [Emphasis in the original] [citing cases]. . . . accordingly, because this is an appeal from a summary judgment, we review the factual submissions to the trial court in a light most favorable to finding a material issue of fact. [citing cases]. "A genuine issue of fact exists where, **on the basis of the facts in the record,** reasonable minds could differ on any material issue [citing cases].

Id. See also Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982).

The Appellee fails to cite one factual issue asserted on

appeal that was not included in the Record at the time Judge Burningham heard arguments on the motion for summary judgment. As demonstrated hereinafter, all of the facts asserted by the Appellants were contained in the pleadings, affidavits and depositions relied upon by the parties at the trial level.

## POINT II: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM OF ANTICIPATORY BREACH OF CONTRACT.

### A. The Elements of Anticipatory Breach of Contract.

In the Appellants' original brief, the law relating to anticipatory breach is recited. An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent not to render performance when the time fixed for performance is due. Kasco Services Corp. v. Benson, 831 P.2d 86 (Utah 1992); Hurwitz v. David K. Richards, Co., 20 Utah 2d 232, 234-235, 436 P.2d 794, 796 (1968).

Utah case law establishes that the other party can immediately treat the anticipatory repudiation as a breach, or it can continue to treat the contract as operable and urge performance without waiving any right to sue for that repudiation. Kasco Services Corp, supra, United California Bank v. Prudential Ins. Co. of America, 681 P.2d 390, 433 (Ariz. Ct. App. 1983); See also, University Club v. Invesco Holding Corp., 504 P.2d 29, 39 (Utah 1972). As noted by the Court in Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 725 (Utah Ct. App. 1990):

> A party that has received a definite repudiation from the breaching party to the contract should not be

> penalized for its efforts to encourage the breaching party to perform its end of the bargain.

The Appellees do not challenge the Appellants' statement of the law relating to the elements of anticipatory breach or the rights that an anticipatory breach creates in the non-breaching party (Appellees' brief at 23).

**B. <u>There are Disputed Issues of Material Fact Relating to the Anticipatory Breach of Contract by the Defendant.</u>**

Appellees totally misconstrue the importance of the existence of anticipatory breach in this case. The Appellees simply argue that:

> Anticipatory breach is not a cause of action but rather is a legal ground for the non-breaching party to make an election . . . a separate claim for an anticipatory breach is meaningless.

Appellees' brief at 23.

The importance of the anticipatory breach cause of action is that a finding by the fact finder that Defendants breached the agreement would have exempted the Plaintiffs from making any further payments under the agreement and would have precluded the Defendants from foreclosing on the contract.

It should be noted that the Appellees do not address any of the factual issues raised by the Appellants with regard to the issue of anticipatory breach (Appellees' brief at 23).

In summary, the payment ledger, Addendum No. 2 to Appellants' original brief, demonstrates that after the credit line was opened on July 7, 1986 there were wide fluctuations in

the balance of the $50,000.00 line of credit. The Plaintiffs withdrew significant amounts and likewise made payments of over $32,000.00 (R. 140-142, Addendum No. 2 to Appellants' original brief).

The facts establish that the Plaintiffs continued to make payments on the loan up to June of 1991 (R. 140-142, Addendum No. 2 to Appellants' original brief).

On July 7, 1991, Mr. Chris Wold, the loan officer for the Defendants wrote a letter to the Plaintiffs requiring monthly payments for the months of June, July and August of 1991 and then payment in full of the credit line by August 27, 1991 (R. 139).

The Plaintiff, Steven C. Davis testified that he had two conversations with Mr. Wold in person in which Mr. Wold "promised to reopen [the] credit line and allow [Davis] to use it upon payment of . . . $19,000.00 (Steven C. Davis deposition at 58-59, Addendum No. 5 to Appellants' original brief). Further, in Steven C. Davis's affidavit of January 9, 1993, Mr. Davis stated:

> 2. On or about June 17, 1991, a management employee of Defendant, Chris Wold, indicated to myself and Defendant Clyde Davis that if a pay down on the credit line was made in the amount of nineteen thousand dollars ($19,000.00), that the credit line would remain open and available for use.
>
> 3. Based upon the representation of Chris Wold, defendant Clyde Davis paid down the credit line on order that I could go back to school and would be able

to keep the account current by making payments on the credit line from the available balance.

R. 19-20.

The Defendant, H. Clyde Davis, testified in his deposition and affidavit that Chris Wold told him that if the Plaintiffs would pay the $20,000.00, the credit line would be reopened and would be available for use by the Plaintiffs (H. Clyde Davis deposition at 22-23, 26-29, Addendum No. 6 to Appellants' original brief).

Amazingly, Chris Wold, in his affidavit filed by the Defendants acknowledged that if the $20,000.00 were paid and "interest only" payments were made and if the first mortgage remained current, the credit line could be paid off within a "reasonable period of time" and that "U.S. Bancorp would 'work with' the Davis . . . ." (R. at 80-81).

The Record is clear that after the Plaintiffs made the $20,000.00 payment, the Defendants refused to allow the Plaintiffs to withdraw any monies from the credit line.

The facts outlined above establish an anticipatory breach of contract in that Mr. Wold refused to extend the line of credit even though the Plaintiffs had paid the required $20,000.00. No one disputes that Wold's action in refusing to open the line of credit constitutes "a positive and unequivocal intent not to render performance." Hurwitz v. David K. Richards Co., 436 P.2d 794, 796 (Utah 1968).

The Plaintiffs' position is that they were entitled, upon

the anticipatory breach by the Defendants, to refuse to make any further payments on the credit line. Additionally, the anticipatory breach by the Defendants would preclude the Defendants from using the Plaintiffs' failure to pay as a basis to foreclose on the credit line.

The Plaintiffs' theory is that an agreement was reached with Mr. Wold, an agent of the Defendants, that if the Plaintiffs paid the required $20,000.00, the credit line would remain open, allowing the Plaintiffs to access the same for any use, including obtaining money to make temporary payments to the Defendants.

The Plaintiffs contend that the facts outlined above demonstrate an anticipatory breach. Upon the anticipatory repudiation of the contract, the Plaintiffs could treat the same as a breach and be excused from any further performance or payment. Kasco Services Corp., v. Benson, 831 P.2d 86 (Utah 1992); See Appellants' original brief at 14. Contrary to the assertion to the Defendants on appeal, a finding of anticipatory breach by the trial court would have precluded summary judgment and constituted a defense to the foreclosure action by the Defendants. Utah case law established that a party to a contract can not by willful act or omission make it impossible or difficult for another to perform and then invoke the others non-performance as a breach. Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982); Reed v. Alvey, 610 P.2d 1374 (Utah 1980); Ferris v. Jennings, 595 P.2d 857 (Utah 1979); Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978).

## POINT III: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM OF BREACH OF CONTRACT.

### A. Elements of Breach of Contract.

The Appellees do not dispute the elements of a cause of action based upon breach of contract set out in the Appellants' original brief (Appellants' original brief at 23, Appellees' brief at 24).

### B. There are Disputed Issues of Material Fact Relating to the Plaintiffs' Claim of Breach of Contract.

The Defendants do not contest the assertion of the Plaintiffs that the Record in this case clearly establishes a claim for breach of contract. Although the Ninth Cause of Action of Plaintiffs' compliant is captioned "Breach of Fiduciary Duty," the Appellees do not contest that the cause of action substantively identifies the elements of a cause of action for breach of contract. In fact, Appellees state:

> Appellants' arguments in support of their Ninth Cause of Action might otherwise be well and good, except that that action was dismissed by stipulation of the parties in open court. The order granting summary judgment dismisses the First, Second, Third, Fifth, Seventh and Eighth Causes of Action, and then states: "Inasmuch as plaintiffs' other causes of action have already been dismissed by stipulation and order, plaintiffs' complaint is now fully dismissed with prejudice."

Appellees' brief at 24.

The Record in this case relating to the hearing on the

motion for summary judgment consists of a Minute Entry and the Order prepared by counsel for the Defendants. The Minute Entry dated the same day as the argument, January 3, 1994 fails to recite any stipulation relating to the voluntary dismissal of any of the causes of action contained in the Plaintiffs' complaint (R. 446-447).

In the Order prepared by counsel for the Defendants there is one sentence, contained in the recitals of the Order that relates to the alleged stipulation. The recital language is not included in the substantive portion of the Order. The one sentence recites:

> Inasmuch as plaintiffs' other causes of action have already been dismissed by stipulation and order, plaintiffs' Complaint is now fully dismissed with prejudice.

R. 552, Addendum No. 1 hereto.

A review of the entire Record in this case fails to produce any stipulation and order relating to the dismissal of the Ninth Cause of Action. Counsel for the Plaintiffs neither stipulated to the dismissal of the Cause of Action in open court nor signed any stipulation or order relating thereto.

Rule 41(a)(1) is explicit:

> . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary

judgment, or (ii) **by filing a stipulation of dismissal signed by all parties who appeared in the action** . . . . (Emphasis added).

Rule 4-504(3) of the Code of Judicial Administration recites that:

> Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within 15 days of the settlement and dismissal.

The facts of this case establish that no stipulation was prepared, signed or delivered to the court. The one phrase relating to a proposed stipulation is contained only in the recitals to the order granting summary judgment and was not part of the substantive order. Additionally, a Court Order would be ineffective inasmuch as the dismissal was based upon a non-existent stipulation. The Appellees argue further that the Appellants failed to establish a material issue of fact relating to damages (Appellees' brief at 24). Defendants do not dispute the extensive factual outline of the disputed issues of fact relating to the Plaintiffs' claim of breach of contract (Appellants' brief at 23-27).

There is simply no question that the Plaintiffs have established a prima facie case of breach of contract. Taking the evidence in the light most favorable to the Plaintiffs, the Defendant was obligated to allow the Plaintiffs access to the credit line after the $20,000.00 was paid. The failure to allow

that access caused the Plaintiffs failure to make the required monthly payments and inability to prevent the foreclosure. As a result, the Defendant was allowed to foreclose on the Plaintiffs' home and property and the Plaintiffs were denied their rights under the credit line agreement.

Equally clear is the prima facie case of the Defendant's breach of the implied covenant of good faith dealing. Mr. Wold failed to create a document memorializing the conditions attached to the $20,000.00 payment. That failure is especially crucial in that Mr. Wold's own affidavit recognized that he had agreed to forego foreclosure and allow the Plaintiffs a "reasonable time" in which to pay off the loan. Under those conditions, a lending institution clearly has a duty to document the transaction to prevent any misunderstanding. Additionally, the failure of Mr. Wold to send a letter to the Plaintiffs outlining his position before commencing foreclosure and setting the matter for sale constitutes egregious conduct. Granting the Defendant the right to commence foreclosure certainly constituted significant damage for which the Plaintiffs are entitled to recover.

The Plaintiffs right to recover special damages is discussed hereinafter. For purposes of the breach of contract cause of action, the wrongful commencement of foreclosure proceedings and denial of the right to access the remaining credit line constitute sufficient damage to avoid the entry of summary judgment.

## POINT IV: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CAUSE OF ACTION

**BASED ON ESTOPPEL.**

**A. Elements of Estoppel.**

The Appellees do not dispute the elements of equitable estoppel (Appellees' brief at 21). The elements essential to invoke equitable estoppel are (1) a statement, admission, act, or failure to act by one party that is inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and, (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. Eldredge v. Utah State Retirement Board, 795 P.2d 671 (Utah Ct. App. 1990); CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969-70 (Utah 1989); Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979); Utah Dep't of Transp. v. Reagan Outdoor Advertising, Inc., 751 P.2d 270, 271 (Utah Ct. App. 1988).

**B. The Plaintiffs Established a Prima Facie Case of Estoppel.**

The Appellees do not dispute that the basis the trial judge used in granting summary judgment on the estoppel issue is as follows:

> . . . Although the plaintiffs presented evidence about their understanding of what would happen after making a $19,000.00 payment to U.S. Bancorp, there was no evidence presented as to any actual statement made by an employee of U.S. Bancorp that mislead the

> plaintiffs and/or Clyde Davis. Based on the lack of competent evidence to prove any erroneous statement, the Court need not address the issue of damages.

R. 551.

The Defendants apparently do not dispute that the Plaintiffs have created a factual issue with regard to equitable estoppel. The Defendants do not dispute that Chris Wold, as an agent of the Defendants, represented that the Plaintiffs would have no problem withdrawing further funds from the credit line in order to go to school if the $20,000.00 payment was made (R. 48, R. 19-20, 79-84; Steven C. Davis deposition at 58-59, Addendum No. 5 to Appellants' original brief). Obviously the facts establish that the Plaintiffs relied upon the statement made by Wold by making the $20,000.00 payment. As a result, the Plaintiffs were forced to take out other loans (R. 45), suffered through post-traumatic stress syndrome (Response to Interrogatory No. 7), suffered through damaged relations with neighbors, suffered disruption of family life and incurred other losses (Response to Interrogatory No. 7).

The Defendants argue that estoppel must be proved by clear and convincing evidence and that the burden of proof has some bearing on these proceedings (Appellees' brief at 21). However, Utah law is clear that:

> . . .as to questions concerning material issues of fact, "affidavits and depositions submitted in support of and in opposition to a motion for summary judgment

> may be used only to determine whither a material issue of fact exists, not to determine whether one party's case is less persuasive than another's or is not likely to succeed in a trial on the merits."

Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983); See also Ron Shepherd Insurance v. Shields, supra. As clearly indicated by the case law, the issue on appeal is whether a material issue of fact exists and not whether or not the burden of persuasion has been met.

Secondly, Appellees argue that the Plaintiffs' claims relating to estoppel are barred by the Statute of Frauds (Appellees' brief at 22).

The claim of the Appellees fails in two regards. First, the Plaintiffs have a cause of action based upon the clear language of the original U.S. Creditline Revolving Creditline and Disclosure (R. 75-78, Addendum No. 1 to Appellants' original brief). Under the terms of the agreement the Defendants had an obligation "so long as [the] account is not cancelled, you are not in default, or there has not been any material adverse change in your financial condition, [to] lend you money according to this account . . . . (R. 75-78). As indicated in the Statement of Facts of Appellants' original brief, timely payments were made by the Plaintiffs up to the time that Mr. Wold wrote his letter to the Plaintiffs dated July 7, 1991 demanding that the note be paid off in its entirety by August 27, 1991 (R. 139).

Secondly, the Plaintiffs are not relying exclusively upon

oral modifications to the original agreement. Mr. Wold's letter of July 7, 1991 deviates from the stated conditions of the credit line agreement. Further, Mr. Wold, in his affidavit acknowledges that the $20,000.00 payment entitled the Plaintiffs to a reasonable period of time to resolve the matter (R. at 80-81).

In summary, the Plaintiffs are not trying to establish an independent agreement with the Defendants. Rather, the issue relates to a determination of the Plaintiffs' rights under the terms of the credit line agreement once the $20,000.00 payment was made. That issue must be resolved by looking to the agreement and the conversation and dealings between the parties. Utah Code Annotated 25-5-4(6) (1989 as Amended), prohibits enforcement of credit agreements that are not founded in writing. However, the use of parol evidence to establish a course of dealing between parties on a credit line agreement is not prohibited by the explicit language of the Statute of Frauds.

## POINT V: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CAUSE OF ACTION BASED UPON MISREPRESENTATION.

### A. Elements of the Misrepresentation Cause of Action.

The Appellees do not contest the elements of a cause of action for Misrepresentation as outlined in the Appellants' original brief (Appellees' brief at 20). The Elements of Misrepresentation are:

> (1) That a representation was made;
>
> (2) concerning a presently existing material fact; (3) which was false; (4) which the

representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (a) and was thereby induced to act (9) to his injury and damage.

Mostrong v. Jackson, 866 P.2d 573, 577 (Utah Ct. App. 1993); Schuhman v. Green River Motel, 835 P.2d 992, 994 (Utah 1992); Wright v. Westside Nursery, 787 P.2d 508, 512 (Utah App. 1990); Pace v. Parrish, 247 P.2d 273, 274-275 (Utah 1952).

**B. The Plaintiffs have Established a Prima Facie Case of Misrepresentation Which Should have Precluded the Entry of Summary Judgment.**

The Plaintiffs, in their Statement of Facts clearly outline material issues of fact relating to the Misrepresentation Cause of Action. The Appellees cite favorable portions from the depositions of Steve Davis and Clyde Davis and then state that "misrepresentation must be proved by clear and convincing evidence" (Appellees' brief at 18-29).

However, as indicated repeatedly herein, the issue on this appeal relates to the existence of material issues of fact and not a weighing process involving the determination of which party is more persuasive. Webster v. Sill, supra; Ron Shepherd Insurance v. Shields, supra.

There is ample evidence that the Defendant's agent, Chris Wold made an explicit representation to the Plaintiffs regarding the credit line agreement. In summary, Chris Wold represented that U.S. Bancorp would not take any further action with regard to the alleged negative amortization of the first mortgage as long as the Plaintiffs paid a $19,000.00 payment and two payments of $500.00 to be applied to regular monthly payments. In addition, Mr. Wold represented that the available credit, up to $50,000.00 would be available to the Plaintiffs to finance schooling and meet their other monthly expenses including the monthly obligations owing to U.S. Bancorp. That representation made by Mr. Wold concerned a presently existing material of fact.

The representations of Mr. Wold were no doubt false in that the Defendants instituted a foreclosure action. The fact finder could easily determine that Mr. Wold made the representation to the Plaintiffs in order to induce the Plaintiffs in to making the $20,000.00 payment and reducing the credit line. Even Mr. Wold concedes that a deal was made:

> 14. Affiant [Wold] told H. Clyde Davis that if payment of $20,000.00 was received for the month of June, (A) additional monthly payments to U.S. Bancorp of at least "interest only" would have to be made monthly to U.S. Bancorp, (B) monthly payments to HUD would have to be kept current, and (C) the credit line would still have to be paid off.

R. 81.

The fact finder would have to determine the meaning of the words used in Mr. Wold's deposition and particularly the meaning of "paid-off within a **reasonable** period of time and that U.S. Bancorp would "**work with**" the Davis while the credit line was being paid off (R. 80). The facts established by the Plaintiffs' testimony and that of H. Clyde Davis was that the payment was made to solve any complaints of U.S. Bancorp and based upon the representation that the credit line, up to $50,000.00 would continue to be available.

A fact finder could easily determine that the Plaintiffs and the Defendant H. Clyde Davis acted reasonably in paying the money and were ignorant of any falsity attached to Mr. Wold's representations.

As a result of the Plaintiffs reliance, they were damaged. They lost the source of funds from which to make the monthly payments to the Defendant and to prevent foreclosure. In addition, the Plaintiffs loan with the Defendant became delinquent and allowed the Defendant the basis upon which to foreclose.

The Appellees again contend that the Appellants could not prove damages arising out of the claimed misrepresentation (Appellees' brief at 20). As demonstrated throughout the pleadings and briefs, the largest item of damage suffered by the Plaintiffs was the foreclosure of their home and property given as security for the credit line and the inability to discharge the loan by regular monthly payments. That element alone is

sufficient to survive summary judgment.

Counsel for the Plaintiffs recognized that prior counsel for Plaintiffs may have been dilatory in establishing the ancillary damages alleged in the complaint consisting of post-traumatic stress syndrome, lost wages and other required items. However, the Defendants have maintained throughout that the conduct of the Plaintiffs precludes the foreclosure of the property (R. 449-457, R. 14-28; 57-67).

## POINT VI: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CAUSE OF ACTION FOR SLANDER OF TITLE

### A. The Elements for Slander of Title.

The Appellees do not dispute the four elements constituting Slander of Title. First, there must be a publication, either oral or written, of a slanderous statement. A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property; Second, the statement must be false; Third, the statement must have been made with malice; and, Fourth the statement must cause actual or special damages to the Plaintiff.

Bass v. Planned Management Services, Inc., 761 P.2d 566 (Utah 1988); Jack B. Parsons Cos. v. Nield, 751 P.2d 1131, 1134 (Utah 1988); Dowse v. Doris Trust Co., 208 P.2d 956, 958 (Utah 1949).

### B. The Plaintiffs Established a Prima Facie Case for Slander of Title.

As it relates to the first element, Appellees still deny that the foreclosure was published. Utah Code Annotated 57-1-25

(1989 as Amended) provides that the notice of sale must be published three times in a newspaper of general circulation and by posting notice of the same on the property and also in at least three public places. The Defendants do not seriously argue that the foreclosure was not completed and in fact notice of various sales was published numerous times. It was the setting of the sale, pursuant to the trust deed that prompted the motions for preliminary injunction (R. 15-28).

Appellees then argue that the filing of a wrongful foreclosure is privileged, to the same extent as a lis pendens (Appellees' brief at 26). The commencement of a wrongful foreclosure and the posting of a notice of sale is not protected. Bass v. Planned Management Services, Inc., 761 P.2d 566 (Utah 1988); Jack B. Parson Co., v. Nield, supra.

It is important to note that the Plaintiffs do not contend that the notice of default alone constituted a slander of title. Rather, the notice of the trustee's sale based upon wrongful foreclosure constitutes the slander of title.

Finally, Appellees claim that the Plaintiffs have failed to establish damages. The Plaintiffs were required to initiate this action to both stop the foreclosure and remove the lien created by the foreclosure from the property (R. 1-28, 37-50, 57-64). The Complaint and Amended Complaint both request an award of attorney fees. Inasmuch as attorney fees were expended to remove the cloud from the Plaintiffs' and the Defendant H. Clyde Davis' title, the attorney fees constitute the special damages required

to make a prima facie case for slander of title. Bass, supra.

**POINT VII: THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CAUSE OF ACTION FOR DEFAMATION.**

The Appellees do not address the substance of the Plaintiffs' cause of action for Defamation (Appellees' brief at 26-29). Although included in the title of the Point, there is no refutation to the argument made in the Appellants' original brief.

The Plaintiffs contend that the court granted the motion for summary judgment on the basis that "the court has not been given any evidence of publication of alleged defamatory comments." (R. 549-550). Appellees contended at trial that the Plaintiffs failed to establish any damage.

Unlike slander of title, the tort of liable and slander are personal torts. Personal torts may be based on tangible and intangible losses and give rise to presumed general and special damages. Bass v. Planned Management Services, supra. Accordingly damages are not relevant and were not used as a basis in deciding summary judgment as it relates to the Defamation cause of action.

There is no question in the case law that the imputation of indebtedness or delinquency in paying ones debts is libellous. Reed v. Melnick, 471 P.2d 178 (N.M. 1970); Hinkle v. Alexander, 411 P.2d 829 (Or. 1966); Alaska Statebank v. Fairco, 674 P.2d 288 (Ala. 1983). Certainly in this case, the commencement of a foreclosure action without any right is libelous in that it

inasmuch as its fair meaning is that the Plaintiffs are delinquent and are unable to pay their debts.

As it relates to the claim that there was no publication, the pleadings establish the requisite issues of fact. As established by the pleadings and Utah Code Annotated 57-1-31 (1985 as Amended), the Notice of Sale must be published at least three times, once a week for three consecutive weeks in a newspaper having a general circulation in the county in which the property is to be located. Additionally, the Notice of Sale must be posted on the property to be sold and also in at least three public places of the city or county where the property is located. Utah Code Annotated 57-1-25 (1989 as Amended). In light of the clear public filings and posting, there is clear evidence in the record that the libelous statements were in fact published and the court committed error in granting summary judgment.

**POINT VIII: THE TRIAL COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT OF THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION.**

Appellees sole rebuttal to the Plaintiffs' contention that the court erroneously granted summary judgment on the issue of Negligent Infliction of Emotional Distress is:

> Even if U.S. Bancorp and its employees knew of the Appellants' mental frailties, there was no evidence that the action to foreclose the real property was anything but lawful.

Appellees' brief at 25.

As established time and time again, there is considerable question as to whether the foreclosure was lawfully commenced. The Plaintiffs have established that Chris Wold, an authorized agent of the Defendants, explicitly agreed with the Plaintiffs that upon the payment of $20,000.00, no foreclosure would take place and the Plaintiffs would have full rights to access the credit line.

Additionally, the issue of whether or not the conduct of U.S. Bancorp in commencing the foreclosure under the facts of this case constitutes "extreme and outrageous conduct," is a question of fact to be resolved by the fact finder. As stated by the Court in Gammon v. Osteopathic Hosp. of ME., Inc., 534 A.2d 1282 (ME. 1987), the issue of the type of conduct that is compensable, is best left to the jury.

Certainly, the facts of this case are not those typically seen in a foreclosure action. The agent and employees of the Defendant lured the Plaintiffs into paying $20,000.00 and then wrongfully commenced foreclosure. The Record establishes that the agents and employees of the Defendant knew that the Plaintiffs were suffering from Post-Traumatic Stress Syndrome. Further, the agents of the Defendant knew that they had promised the Plaintiffs continued access to the credit line in order to meet their regular monthly expenses and specifically the monthly payments owing to the Defendant. It is respectfully submitted that any reasonable person would know that the total repudiation of the agreement and the initiation of foreclosure activities

with the posting of notices would cause persons suffering from Post-Traumatic Stress Syndrome to suffer additional emotional and physical harm.

**POINT IX: THE TRIAL COURT ACTED PROPERLY IN DENYING AN AWARD OF ATTORNEY FEES.**

The court ruled that it would not allow the Defendants to re-coup attorney fees incurred in defending against the torts alleged by the Plaintiffs. The court did allow the award of attorney fees associated directly with the foreclosure action (R. 566-567, 568-571).

Plaintiffs have failed to find any case which allows the recovery of fees associated with defending against alleged tortious misconduct. The cases cited by the Defendants do not stand for that proposition but relate only to attorney fees incurred in associated contract questions. Brown v. Richards, 840 P.2d 143 (Utah Ct. App. 1992); Trayner v. Cushing, 688 P.2d 856 (Utah 1984).

**CONCLUSION**

This Court should reverse the ruling of the trial court granting summary judgment in this case and deny the Defendants' claim for attorney fees.

DATED this 3rd day of May, 1995.

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## MAILING CERTIFICATE

I certify that 4 copies of the foregoing reply brief were mailed, postage prepaid, to the following on the 3rd day of May, 1995.

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